

The American Chamber of Commerce in China

2019 Policy Priorities

Introduction

Over the last 40 years, China has experienced unparalleled economic development following its decision to embark on a path of economic “Reform and Opening Up.” China is now the second largest economy in the world, with a gross domestic product (GDP) estimated at around US \$12 trillion.¹ China’s economic development has followed a path characterized by gradual market reform, continued government intervention, rapid technological development and increased integration with the global economy. Over the same period, China has become a leading trade partner of the US and both a source and a destination for bilateral foreign direct investment (FDI). The result has been significant commercial opportunity and a growing mutual dependence for companies in China and the US.

Recent events, however, indicate that the bilateral relationship is at an inflection point. Foreign businesses in China are facing an increasingly challenging and uncertain policy environment. Despite the commercial success enjoyed over past 40 years by the US business community, American companies are no longer serving with the same level of enthusiasm as the reliable anchor of US-China relations that they once were. Pressure on the relationship is growing from a combination of tariffs implemented by both countries in 2018 and a simmering trade conflict focused on longstanding challenges facing the US business community in China with respect to market access, intellectual property (IP) protection, regulatory transparency, uneven enforcement of Chinese laws and regulations, and industrial policies that favor domestic companies at the expense of foreign-invested enterprises (FIEs).

Consequently, trust between both sides has reached a low point. Nevertheless, AmCham China continues to believe it is imperative that China and the US find ways to resume and continue productive engagement as bilateral partners. Indeed, a healthy, fair and reciprocal trade relationship is critical for the robust economic growth of both countries.

¹All economic statistics taken from World Bank database.

Our 2019 Policy Priorities aim to promote that crucial cooperation. These priorities reflect the opinions of the Chamber's 3,300 members (half of whom are Chinese nationals) from 900-member companies headquartered not just in the US, but also Europe, Australia and other parts of Asia. They are drawn from multiple discussions among AmCham China members and supported by analysis of the annual *Business Climate Survey* and the *American Business in China White Paper*.

As a focus of our advocacy efforts, these priorities will guide our conversations with Chinese government, US government, media, academics and other stakeholders throughout the year. We acknowledge that the challenges are significant and may not be resolved within the short-term. We hope, however, that we will see meaningful progress during the coming months, and that such progress will form a solid basis for longer-term engagement and dialogue.

Restoring Trust through Concrete Actions Leading to Greater Transparency, Predictability, and Evenhandedness in Regulatory Processes

It is important to acknowledge that the process of building trust in the US-China relationship that formally began in 1979 itself took several decades. Today, the Chinese economy is the world's second largest with a technological capacity that rivals the US in some sectors. In this context, US companies are understandably less accepting of Chinese government policies and practices that provide competitive advantages to their domestic competitors, especially when those competitors generally enjoy full access to the US market. Following many years of bilateral discussions when commitments were often made and not fully implemented, restoring trust will require concrete, measurable actions from both sides. The stability and predictability provided by a transparent and evenhanded regulatory environment will be important for the continued growth of both foreign and domestic businesses in China, and we urge the Chinese government to take further steps to adopt a more fully inclusive and accountable process for the formulation and implementation of laws and regulations. Greater transparency and accountability among regulators would not only aid the government's fight against corruption, but also boost confidence in private companies, both domestic and overseas, that their investments will be fairly protected under law.

- *Inconsistent/unclear regulations and enforcement remain the No. 1 challenge for AmCham China members for the fourth consecutive year. (2019 Business Climate Survey).*
- *"Greater transparency, predictability and fairness of the regulatory environment" was cited by more than half (53%) of members as a "very" or "extremely significant" potential driver of new investment. (2019 Business Climate Survey).*

- *Despite progress, China still ranks only 78 out of 126 countries for regulatory enforcement in the 2019 Rule of Law Index. (World Justice Project)*

To restore trust in the bilateral relationship, we recommend that:

- *Both governments prioritize bilateral communication at the working level and with strong business community engagement on both sides, as well as high-level dialogue.*
- *Commitments to meaningful reform include clear benchmarks, timelines and intensive monitoring to ensure lasting changes to China's legal and regulatory architectures and impartial implementation of laws and regulations.*
- *Transparency be improved by releasing formal findings and case histories of anti-monopoly and other compliance-related investigations.*
- *The use of "window guidance" be eliminated and public directives be released instead.*
- *Written explanations be provided whenever administrative agencies deny or provide conditioned approvals for license applications or other approval applications, or when they fail to adhere to decision deadlines provided for in relevant laws and regulations.*
- *Foreign companies be given equal opportunity to participate in the drafting and review of relevant laws and regulations, including ensuring draft "comment periods" are provided with reasonable timelines and made public far enough in advance to ensure full participation by the domestic and foreign business communities.*

Promoting Development through Policies of National Treatment and Competitive Neutrality

Policies that emphasize national treatment benefit the entire economy – not just foreign enterprises. We believe that government policy should place all parties in China – including both domestic and international firms and public and private companies – on an even, competitive footing. Enacting a policy of "competitive neutrality" is especially important given the increasing scrutiny facing the US-China commercial relationship and the questions being raised internationally about the greater market access enjoyed by Chinese companies overseas compared to the access FIEs have in China.

- *The economic and technological impact of foreign-invested enterprises, and the ripple effects through their supply chains and the spending of employees, averaged 33% of China's GDP from 2009 to 2013. Despite a decline in global FDI in 2017, China*

remained the second largest global recipient of FDI. (Developing China: The Remarkable Impact of Foreign Direct Investment; UNCTAD World Investment Report)

And yet:

- *China's restrictive investment regime blocks investment in key industries. China's average tariff level (9.9%) is nearly three times higher than the US (3.5%).*
- *China's licensing and approval regimes forestall or deny market access even in nominally open sectors.*
- *Informal practices and other non-tariff barriers such as anti-trust and standard-setting processes, and lengthy customs licensing procedures, limit US companies' ability to compete equally in the market.*
- *More companies say the investment environment is "deteriorating" (21%) or "staying the same" (41%) rather than improving (38%). (2019 Business Climate Survey)*
- *Nearly half of our members (44%) believe foreign companies are treated unfairly; 46% feel less welcome than before. (2019 Business Climate Survey)*
- *China has shown a distressing propensity to retaliate without legal justification against FIEs and imports from particular countries which are perceived to have displeased China.*

To promote creation of a truly level playing field, we recommend that:

- *Foreign investors be provided treatment no less favorable than the best treatment offered to any domestic Chinese company, whether private, state-owned or state-controlled.*
- *Laws and regulations, enforcement activities, approval processes, procurement preferences, and other requirements that treat foreign entities, products, and services less favorably than domestic firms be eliminated.*
- *Market opening be implemented in more sectors, particularly areas in which previous commitments have already been made, to achieve a more balanced investment relationship. If Chinese businesses can make an investment in the US, American companies should be able to make the same investment in China subject to the same terms and conditions.*
- *The Chinese government substantially narrow its foreign investment Negative List, bringing it in line with those in other advanced economies.*

- *National security reviews and “secure and controllable” technology requirements be narrowly applied and not used for economic protectionism or in support of industrial policy.*
- *The Chinese government reduce overcapacity, fully declare subsidies and eliminate those that are non-WTO compliant, and remove other policies that promote unfair competition.*

Stimulating Innovation through Policies that Promote Global Cooperation and Intellectual Property Protection

Innovation has ripple effects that bring broad benefits to the economies of both China and the US. Research and Development (R&D) activities are a critical activity for both domestic and foreign companies operating in China. Sustained creativity, however, can only be realized on a level playing field with equal protection of rights under law – both on paper and in practice – for foreign and domestic companies alike. To realize its innovation goals, China needs to strengthen its infrastructure and open its institutions to allow information to flow more freely. Creativity is the product of diverse ideas combined in an environment where technology-neutral standards are set with broad participation and IP is protected from theft. We believe the rapid pace of innovation exceeds the ability of any single government to manage, meaning that technology regulation requires public-private engagement across borders. Moreover, R&D will be most effective when it is subject to intellectual property protection and equitable standards for all innovators.

- *Innovation is a top-three priority for more than half (54%) of our members. (2019 Business Climate Survey)*
- *Lack of sufficient IP protection is the No. 1 (35%) barrier to increasing innovation in China. (2019 Business Climate Survey)*
- *Although China’s IP protection regime improved significantly towards the end of the last decade, the level of IPR protection has since stagnated. In 2018 China was ranked 52 out of 125 countries with respect to IP protection. (The International Property Rights Index, 2018)*
- *In addition to IP protection, increased restrictiveness of cybersecurity-related policies constitutes a significant barrier (27%) to increasing innovation in China. (2019 Business Climate Survey).*

We recommend that:

- *The Internet be promoted as a platform for global interaction and restrictions on cross-border data flows such as those proposed in the Cybersecurity Law be limited to encourage international collaboration and innovation.*
- *A comprehensive trade secrets law be developed.*
- *The successful development of IP courts be continued and the power of administrative bodies (e.g., NIPA) to investigate and punish infringement be balanced alongside the continued development of IP courts.*
- *A clear, unified system of penalties be established to deter IP theft including through cyber-enabled means.*
- *Ensure standards development Technical Committees are open to FIEs in practice (as stated in the 2019 Foreign Investment Law) so that they can participate on an equal basis with domestic companies. Standards development processes should seek to bring China's domestic standards in line with internationally-accepted standards and best practices.*

中国美国商会

2019 年政策重点

引言

过去 40 年，中国自从开始改革开放后，经历了前所未有的经济发展。中国现在是世界第二大经济体，GDP 预计达到 12 万亿美元左右。中国经济发展的道路的特点为渐进式市场改革、政府持续干预、科技快速发展、与世界经济进一步融合。同期，中国已成为美国的主要贸易伙伴和双边外国直接投资来源国和目的国。因此，中美两国企业获得了巨大的商业机会，并日益相互依赖。

然而，最近的形势发展表明，两国关系正处于转折点。在华外资企业面临的政策环境越来越充满挑战性和不确定性。尽管美国企业在过去 40 年取得了商业上的成功，但美国企业不再像过去那样，热情洋溢地推动中美关系。两国于 2018 年互相加征关税，在华美国企业长期面临的挑战，如市场准入限制、知识产权保护不足、监管缺乏透明度、执法尺度参差不齐、偏袒国内企业的产业政策等，导致了贸易冲突一触即发。两国关系压力不断攀升。因此，双方之间的信任已经触底。尽管如此，中国美国商会仍然认为，中美两国当务之急是想方设法恢复并保持富有成效的双边伙伴关系。事实上，健康、公平、对等的贸易关系对两国经济的强劲增长至关重要。

2019 年的政策重点旨在促进上述合作关系。我们收集了来自 900 家商会会员企业 3300 名人员(其中一半是中国公民)的意见，这些会员企业总部分布在美国、欧洲、澳大利亚和亚洲其它地区。以下建议经商会会员多次讨论，并建立在商会《中国商务环境调查报告》和《美国企业在中国白皮书》的基础上。

作为我们政策建言的核心关注点，2019 政策重点将指导我们与中国政府、美国政府、媒体、学术界和其他利益攸关方进行对话。我们认识到，当前中美面临的严峻挑战在短期内可能无法得到解决。但是，我们希望在今后几个月的谈判能有实质性的进展，为未来长期合作和对话奠定坚实基础。

通过实际行动重建信任，从而提高监管程序的透明度、可预测性和公平性

美中于 1979 年正式建交，两国建立信任就花了几十年的时间，认识到这一点很重要。今天，中国已跃居世界第二大经济体，其技术能力在多个领域都可与美国相媲美。在这种情况下，美国公司自然不太能接受中国政府为其国内竞争对手提供竞争优势的政策和做法，

尤其这些竞争对手通常能够自由进入美国市场。多年双边讨论经常是作出承诺却未充分执行，所以恢复信任将需要双方采取具体的、可衡量的行动。透明和公正的监管环境所提供的稳定性和可预测性对于国内外企业在中国的持续增长至关重要，我们敦促中国政府采取进一步措施，采取更全面、负责的法律法规制定和实施流程。监管机构提高透明度和问责制，不仅有助于政府打击腐败，还将增强人们对国内外私营企业的信心，相信其投资平等地受到法律的保护。

- 法规及执法不一致/不明确仍然是商会会员连续第四年面临的头号挑战。(2019年度《中国商务环境调查报告》)。
- 超过半数(53%)的成员认为，“提高监管环境的透明度、可预测性和公平性”是新投资的“非常重要”或“极其重要”的潜在驱动力。(2019年度《中国商务环境调查报告》)。
- 虽然有所进展，但在2019年法治指数排名中，在监管执法这一项，中国在126个国家仍然只排第78名(世界正义项目)。

为了恢复对双边关系的信任，我们建议：

- 两国政府都重视工作层面的双边沟通，并加强双方商界的参与及高层对话。
- 进行有效改革，纳入明确的基准、时间表和密集监控机制，以确保中国法律和监管架构的持久变革以及法律和法规的公正实施。
- 通过发布反垄断和其他相关合规调查的正式调查结果和历史案例来提高透明度。
- 不再使用“窗口指导”，而采用公共指令。
- 当行政机构拒绝提供或提供有条件的许可证申请或其他批准申请，或处理申请超出了法律法规所规定的处理时间时，应提供书面解释。
- 为外国公司提供平等参与起草和审查相关法律、法规和标准的机会，确保草案“评议期”有合理的时间表，并提前公布，以确保国内外商界的充分参与。

以国民待遇和竞争中立政策促进发展

强调国民待遇的政策有利于整体经济 - 而不仅仅是外商投资企业。我们认为，中国的政策应该把国内外各相关方置于一个平等、有竞争力的基础之上。制定“竞争中立”政策尤其重要，因为美中商业关系面临越来越严格的审查，国际上对于中国企业在海外相比外商投资企业在中国享受更宽松的市场准入也提出了疑问。

- 2009 至 2013 年，外资企业的经济和技术影响，以及其供应链和员工支出的连锁反应所产生的经济价值占平均约占中国 GDP 的 33%。尽管 2017 年全球外国直接投资有所下降，但中国仍是全球第二大外国直接投资目的国。（《发展中的中国：外国直接投资的显著影响》；联合国贸发会议世界投资报告）。

然而：

- 中国限制性投资制度阻碍了对重点行业的投资。中国的平均关税水平（9.9%）几乎是美国的三倍（3.5%）。
- 即使在名义上开放的行业，中国的许可和审批制度也阻止或拒绝市场准入。
- 非正规做法和其他非关税壁垒，如反垄断和标准制定程序，以及冗长的海关许可程序，都限制了美国公司在市场上平等竞争的能力。
- 越来越多的公司表示，投资环境正在“恶化”（21%）或“保持不变”（41%），而不是在改善（38%）。（2019 年度《中国商务环境调查报告》）
- 近一半（44%）的会员认为外国公司受到了不公平待遇；46%的会员感觉不如之前受欢迎。（2019 年度《中国商务环境调查报告》）
- 令人沮丧的是，中国倾向于在没有法律理由的情况下报复外商投资企业以及限制从某些引起中国不满的特定国家进口。

为促进创造一个真正公平的竞争环境，我们建议：

- 向外国投资者提供的待遇不低于中国国内公司享受的最佳待遇，无论是私企，国企还是国家控制企业。
- 清理对国内企业待遇优于外企的法律法规、执法活动、审批程序、采购偏好和其他要求。
- 在更多部门实施市场开放，特别是已经作出承诺的领域，以实现更加平衡的投资关系。如果中国企业可以在美国投资，美国公司应该能够在相同的条款和条件下在中国进行同样的投资。
- 中国政府大幅缩小其外国投资负面清单，与其他发达经济体保持一致。
- 国家安全审查和“安全可控”技术要求仅用在有限的范围内，不用于经济保护主义或支持产业政策方面。
- 中国政府减少过剩产能，全面申报补贴并取消不符合 WTO 标准的补贴，同时废除其他促进不正当竞争的政策。

通过全球合作和知识产权保护促进创新

创新产生连锁反应，为中国和美国的经济带来广泛的益处。研发活动是在中国运营的国内外企业的重要活动。然而，只有在公平的竞争环境中才能实现持续的创造，要依据法律平等地保护知识产权，不管是书面规定还是实践，对外国和国内公司都要一视同仁。中国要实现其创新目标，就要加强基础设施并开放其机构，使信息更自由地流动。创新是多种想法在一定环境下结合的产物，这种环境包括广泛参与制定技术中立标准以及保护知识产权免受盗取。我们认为，创新速度日新月异，不是任何一个政府能够独立管控的，意味着技术监管需要跨国界的公私参与。此外，只有受到知识产权保护，所有创新者遵守公平的标准时，研发才最有成效。

- 超过半数(54%)会员认为创新是2019年重点前三名。(2019年度《中国商务环境调查报告》)
- 缺乏足够的知识产权保护是中国提高创新的头号障碍(35%)。(2019年度《中国商务环境调查报告》)
- 尽管中国的知识产权保护制度在过去十年结束时有了显著改善，但知识产权保护水平此后一直停滞不前。2018年，在知识产权保护方面，中国在125个国家中仅排名52。(2018年国际产权指数)
- 除了知识产权保护之外，网络安全相关政策的限制性加强也是在中国加大创新的重大障碍(27%)。(2019年度《中国商务环境调查报告》)

我们建议：

- 让互联网成为全球互动的平台，“网络安全法”中限制跨境数据流动仅应用于有限范围，以此鼓励国际合作和创新。
- 制定全面的商业秘密法。
- 继续推动知识产权法院的工作的成功开展，与此同时，在知识产权法院发展与行政机构（如国家知识产权局）调查、惩罚侵权行为的权力间寻找平衡。
- 建立明确，统一的处罚制度，以阻止知识产权盗窃，包括通过网络手段。
- 确保标准制定技术委员会在实践中对外商投资企业开放（如2019年《外商投资法》所述），以便他们能够与国内公司平等参与。标准制定过程应力求使中国的国内标准符合国际公认的标准和最佳实践。